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Office of The Attorney General
State of Connecticut

October 10, 1997

William F. Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: In Matter of Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities
MM Dkt. No. 97-182

Dear Mr. Caton:

Please find enclosed an original and nine copies of the Joint Comments of Richard Blumenthal, Attorney General of Connecticut and of the Connecticut Siting Council on Proposed Rule Making for filing in the above-referenced docket. If there are any questions pertaining to this filing, please contact the undersigned.

Sincerely yours,

Mark F. Kohler
Assistant Attorney General

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Preemption of State and Local Zoning	)	MM Docket No. 97-182
Land Use Restrictions on the Siting,	)	
Placement and Construction of Broadcast	)	
Station Transmission Facilities	)	October 10, 1997

JOINT COMMENTS OF THE CONNECTICUT SITING COUNCIL AND RICHARD BLUMENTHAL, ATTORNEY GENERAL OF CONNECTICUT ON PROPOSED RULE MAKING

I. INTRODUCTION

Richard Blumenthal, Attorney General of the State of Connecticut ("Attorney General") and the Connecticut Siting Council ("Council") respectfully submit these joint comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned matter, initiated by the petition of the National Association of Broadcasters and the Association for Maximum Service Television ("Petitioners"). The Commission seeks comments to assist its determination whether preemption is necessary and desirable and, if so, what the scope of a preemption rule should be. The Attorney General and the Council offer these comments to demonstrate that (a) the exercise of existing state and local siting is not inconsistent with the rapid implementation of digital television ("DTV") service and therefore preemption is unnecessary; and (b) to the extent that the Commission does conclude that some form of preemption is required, such preemption should be narrowly defined to achieve the federal goals for the implementation of DTV. In particular, the Petitioner's proposed preemption rule should

be rejected in favor of a rule modeled after that created by Congress in the Telecommunications Act of 1996 for the siting of personal wireless service facilities.

II. THE JURISDICTION OF THE COUNCIL AND THE EXPERIENCE IN CONNECTICUT WITH FACILITY SITING.

The Council is an agency of the State of Connecticut having jurisdiction over the siting of various electric, gas and telecommunications facilities. Under present Connecticut law, the Council's jurisdiction for new telecommunications facilities is limited to the following: (1) community antenna television towers and head-end structures, Conn. Gen. Stat. § 16-50i(a)(5); and (2) telecommunication towers, including associated equipment that are (a) owned or operated by the State; (b) owned or operated by a public service company; (c) owned or operated by a certified provider of intrastate telecommunications services; or (d) used in a cellular system. Conn. Gen. Stat. § 16-50i(a)(6). The Council's jurisdiction may be affected by the proposed rule directly with regard to state-owned broadcast facilities and indirectly by the relocation of antennas now collocated on existing towers.

Any person wishing to construct a new tower within the Council's jurisdiction that may have a substantial adverse environmental effect must obtain a certificate of environmental compatibility and public need from the Council. Conn. Gen. Stat. § 16-50k; Conn. Agencies Regs. §§ 16-50j-71 to -72. The Council's administrative process for the development of new telecommunications towers includes preapplication consultation with the chief elected official of the site municipality and notice to State and local officials, abutting property owners and to the local community. Conn. Gen. Stat. §§ 16-50l, 16-50m. A public hearing on the application is

held in the local community allowing for full participation by parties and intervenors and the submission of comments by the general public. Conn. Gen. Stat. §§ 16-50m, 16-50n, 16-50o. The Council's decision on the application for a certificate must be rendered within 180 days of the filing of the application, which can be extended on the consent of the applicant. Conn. Gen. Stat. § 16-50p. A Council decision may be appealed to the Connecticut Superior Court by an aggrieved party pursuant to the State Uniform Administrative Procedure Act. Conn. Gen. Stat. § 4-183. The Council's experience has been that most tower siting applications are decided within four months.

The Council also has provisions for regulatory exemptions for modifications of existing towers when the tower height, site boundaries and noise levels are unaffected and the applicant can demonstrate compliance with radio frequency emission standards. Conn. Agencies Regs. § 16-50j-72. This process is usually carried out within two to three weeks upon notice to the Council of the applicant's intent to modify an existing tower.

The Council also has jurisdiction over the sharing of all existing towers and may approve or order sharing whenever such sharing is technically, legally, environmentally and economically feasible and meets public safety concerns. Conn. Gen. Stat. § 16-50aa.

The philosophy that has been fostered by the State of Connecticut is to provide for careful site regulation to protect the public and to encourage the efficient development of necessary telecommunications facilities. The model that the Council uses establishes uniform decision criteria across numerous municipalities, which is critical for the consistent and predictable development of telecommunications networks. The model is generally viewed as effective and is

supported by both the telecommunications industry and the public as fair and objective in resolving difficult siting issues.

III. NO PREEMPTION OF STATE AND LOCAL SITING AUTHORITY IS REQUIRED.

There is no need for the Commission to take the extraordinary step of taking away from State and local authorities their traditional powers to regulate facility siting and land use. There is nothing inconsistent with State and local zoning regulation and the Commission's goal of promoting the rapid development of DTV. Indeed, retaining State and local authority will ensure that such development of DTV is efficient and consistent with the important and legitimate interests of State and local government in the protection of their citizens and the environment.

The Commission's authority to preempt is limited. As Congress has not acted directly to preempt State and local authority in this area, the Commission's power to preempt is limited to the scope of its congressionally delegated authority. Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 369 (1986). Thus, the Commission may not preempt unless State and local regulation creates such an obstacle to the accomplishment of the Commission's goals with regard to DTV that they cannot be achieved without taking the extraordinary measure of preemption. This is not the case here.

The preemption that the Petitioners seek is unnecessary because part of what they seek already is present under existing law. More importantly, however, there is no basic inconsistency between the Commission's goal of rapid development of DTV and the exercise of State and local siting authority. The "obstacles" cited by the Petitioners include "environmental assessments, 'fall radius,' collocation and marking/lighting requirements, and concerns with interference to other electronic devices." Notice of Proposed Rule Making, at para. 4. As the

Commission stated in its Notice, the Commission's already has exclusive authority over the regulation of radio frequency interference. Id. at para. 12. Similarly, a State or local authority should be preempted from precluding tower lighting, painting or marking that is recommended by the Federal Aviation Administration or required by the Commission. As to the remaining "obstacles," environmental reviews and restrictions on fall zones are not, as the Petitioners appear to suggest, some contrivance thrown up by local officials to prevent development. Rather, they are legitimate forms of regulation designed to ensure that development, as significant as it may be, goes forward in a manner that is consistent with other important values. These are areas that are well within the traditional authority of State and local government, and to limit that authority as the Petitioners request would be an unwarranted intrusion in areas of principally local concern. "Rapid roll-out" of DTV, in and of itself, cannot justify complete disregard for State and local regulation.

IV. IN THE ALTERNATIVE, IF PREEMPTION IS CONTEMPLATED, IT SHOULD BE NARROWLY CONFINED AND SHOULD FOLLOW THE MODEL OF THE TELECOMMUNICATIONS ACT OF 1996.

If the Commission nonetheless determines that preemption is necessary to the achievement of its goals for DTV, it should reject the Petitioner's proposed rule in favor of one that is more narrowly circumscribed and that is modeled on the preemption provided for wireless facilities under the Telecommunications Act of 1996 ("1996 Act"). As the Commission recognized, "it is incumbent upon the Commission not to 'unduly interfere with the legitimate affairs of local governments when they do not frustrate federal objectives.'" Notice of Proposed Rule Making, at para. 15. The proposed rule would go too far.

The 1996 Act's provisions relating to wireless service facilities are a useful model for striking an appropriate balance between federal goals of rapid development of new technology and local concerns for protection of the public and the environment. As to the substantive scope of preemption, the 1996 Act offers appropriate guidance. First, the 1996 Act precludes State and local authorities from regulating wireless facilities on the basis of environmental effects from radio frequency emissions to the extent that such emissions comply with the Commission's regulations. 47 U.S.C. § 332(c)(7)(B)(iv). Where the Commission, or some other federal agency, has established regulations in the exercise of its congressionally delegated authority, State and local officials may not regulate in a manner that is inconsistent with those regulations. To this extent, the proposed prohibitions with regard to radio frequency emission standards, interference effects and lighting, painting and marking requirements are not objectionable.

However, the Attorney General and the Council offer these additional observations should the Commission preempt on these grounds. First, the Commission should provide and update technical guides, such as OET Bulletin 65, to confirm compliance with radio frequency standards and should provide clear specifications and alternatives for lighting and marking through technical publications such as FAA AC70/7460-1H. In addition, should the Commission see fit to preempt local authority on the basis that the Commission will regulate interference issues, the Commission must make greater efforts to intervene and timely resolve complaints of interference and blanketing. The Attorney General and the Council have been informed on several occasions by Connecticut citizens that the Commission has been slow, unwilling or ineffective in resolving such complaints in the past.

Beyond the specific preemption provisions for radio frequency emissions, interference and tower lighting and marking, the Commission should follow Congress' example in the 1996 Act. The Petitioners reject such a model, requiring State and local authorities to justify any regulation as furthering federal interests in the construction of broadcast facilities. Imposing this burden is unjustified. Instead, the Commission should adopt a standard similar to that in the 1996 Act, precluding State and local regulations that "unreasonably discriminate among providers of functionally equivalent services" or that "prohibit or have the effect of prohibiting the provision" of DTV services. 47 U.S.C. § 332(c)(7)(B)(i). Such preemption goes just as far as needed to remove the "obstacles" to the achievement of the Commission's goals without imposing on State and local authorities the burden of justifying their regulations in the manner required by the Petitioners' proposal.

As to the procedural aspects of the proposed rule, the Attorney General and the Council maintain that the unduly short deadlines for State or local action are unjustified and will undoubtedly lead to poor siting decisions. The 1996 Act requires State and local authorities to act on applications within a reasonable period of time. 47 U.S.C. § 332(c)(7)(B)(ii). The Petitioners' proposed rule goes a step further and defines what a reasonable period of time should be -- 21 days for certain modifications to existing towers, 30 days for other modifications and 45 days for all other cases. Proposed Rule, § (a). As to modifications to existing towers, it has been the Council's experience that applications can be acted on expeditiously in most cases; however, despite the facial simplicity of a modification request, some modifications, and in particular consolidation of existing facilities to a new tower (Proposed Rule § (a)(2)(ii)) and increases in tower height (Proposed Rule § (a)(2)(iii)), can present many of the same more complex reviews

as the regulation of new facilities. Moreover, adequate time should be afforded for public comment. The Attorney General and the Council therefore recommend that the time period for all modification decisions be "without delay, but no longer than 60 days."

As to new tower facilities, the Petitioners' proposal of 45 days is completely insufficient. The Council's experience has been that a tower siting proposal cannot possibly be adequately reviewed within such a short time frame without sacrificing the public interest. The regulatory process, both to afford an appropriate technical and regulatory review and to satisfy the due process rights of all concerned parties, must include a public hearing, cross-examination and the development of substantial evidence on which the decision maker may act. The Attorney General and the Council therefore recommend a time frame of 180 days for new tower applications, with discretion to the State or local authority to shorten or extend the deadline on consent of the applicant.

The Attorney General and the Council further object to the review process proposed by the Petitioners. Once again, the Attorney General and the Council urge the Commission to follow the model of the 1996 Act. The Petitioners seek to create a review process by which an applicant (and presumably not other aggrieved parties) may petition the Commission to resolve within an unreasonably short time frame what amounts to an administrative appeal of the State or local authority's decision. Proposed Rule, § (d). The 1996 Act, in stark contrast, provides that "***any*** person aggrieved by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with [§ 332(c)(7)(B)] may, within 30 days after such action or failure to act, commence an action in ***any court of competent jurisdiction***." 47 U.S.C. § 332(c)(7)(B)(v) (emphasis added). Similarly, petitions for declaratory relief to the Commission

are permitted for actions by State or local authorities that conflict with the Commission's radio frequency regulations. Id. This is more appropriate than the Petitioners' proposal for unlimited declaratory relief. Proposed Rule, § (e).[1]

The Petitioners' review proposal is inherently biased against State and local authorities who are unlikely to have the resources to participate in a meaningful way in Commission proceedings, especially given the excessively short time frames contemplated by the proposed rule. In contrast, the 1996 Act's model of appellate review was selected by Congress as an appropriate balance between the competing interests of rapidly advancing the development of wireless communications and of protecting the public interest, including respecting the due process interests of all affected parties, not just those of applicants. There is no justification for rejecting a similar approach for DTV. As important a goal that the rapid development of DTV may be, the legitimate interests of State and local authorities and the public interest in general should not be forsaken in the Commission's quest.

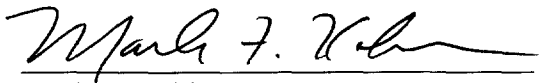
[1] In addition, provision should be made for service of any petitions or requests for review on the State or local authority and any other interested party that participated in the State or local proceedings and for assuring that such authorities and parties have an opportunity to be heard before the Commission.

V. CONCLUSION

For the foregoing reasons, the Petitioners' proposed rule should be rejected.

Respectfully submitted,

RICHARD BLUMENTHAL, ATTORNEY GENERAL OF CONNECTICUT, and the CONNECTICUT SITING COUNCIL

By: 

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